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No. 07-36

IN THE

Supreme Court of the United States

MARIO ALFREDO SALINAS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

To gain a conviction in this closely-contested case, the federal government continuously referenced and elicited testimony regarding petitioner's post-arrest silence. Not once, not twice, but on four separate occasions the prosecutor commented on petitioner's decision after his arrest not to deny unlawful possession of a gun. Pet. 5-7. The reason for this pattern of improper inquiry, was, obviously, the weakness of the government's case. Testimony established that petitioner was driving his brother-in-law's car, that the gun belonged to his brother-in-law, and that the gun was hidden and out of plain sight. Pet. 4-5. On these facts, it was no easy task to persuade a jury to convict petitioner of unlawful gun "possession." The government's transparent strategy was to highlight at every turn petitioner's silence after his arrest.

Before this Court, the government does not dispute that the circuits are deeply divided on whether substantive use of a defendant's silence that is post arrest but before being informed of the right to remain silent under *Miranda v. Arizona*, 384 U.S. 436 (1966), is impermissible under the Fifth Amendment.[1] Nor could it, as three circuits have held that substantive use of post-arrest, pre-*Miranda* silence violates the Fifth Amendment, three more have held that substantive use of pre-arrest, pre-*Miranda* silence violates the Fifth Amendment, and still another three have held that substantive use of pre-*Miranda* silence is permissible.

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[1] In this case, petitioner was *never* informed of his right to remain silent under *Miranda*. Pet. 4.

The question presented is squarely raised here. The Fifth Circuit affirmed petitioner's conviction even though its own controlling precedent held that prosecutorial comment on a defendant's silence is impermissible. A court of appeals cannot insulate a constitutional question from review by this Court merely by the expedience of failing to address controlling circuit precedents. It is clear from the multitude of cases cited by both parties that the question whether substantive use may be made of a defendant's pre-*Miranda* silence repeatedly arises in both federal and state criminal trials across the country. Review is warranted.

I. THE GOVERNMENT AGREES THAT THE CIRCUITS ARE DIVIDED ON WHETHER THE GOVERNMENT MAY USE A DEFENDANT'S PRE-*MIRANDA* SILENCE AS SUBSTANTIVE EVIDENCE OF GUILT.

The government cannot and does not dispute that the federal courts of appeals (as well as the state courts) are deeply divided on whether a defendant's silence before he has received the warnings required by *Miranda*, is protected by the Fifth Amendment such that his silence cannot be used as substantive evidence of guilt. Opp. 8-9 & nn. 2, 3; *see also* Pet. 9-15. Three courts of appeals — the Seventh, Ninth, and D.C. Circuits — have correctly held that substantive use of a defendant's post-arrest, pre-*Miranda* silence impermissibly burdens the defendant's privilege against self-incrimination. *See, e.g.*, *United States v. Hernandez*, 948 F.2d 316, 322, 324 (7th Cir. 1991); *United States v. Velarde-Gomez*, 269 F.3d 1023, 1029-30 (9th Cir. 2001) (en banc); *United States v. Moore*, 104 F.3d 377, 386-87

(D.C. Cir. 1997). Three other courts of appeals — the First, Sixth, and Tenth Circuits — have likewise held that use of pre-arrest, pre-*Miranda* silence as substantive evidence of guilt violates the Fifth Amendment. *See, e.g., Coppola v. Powell*, 878 F.2d 1562, 1567-69 (1st Cir. 1989); *Combs v. Coyle*, 205 F.3d 269, 283 (6th Cir. 2000); *United States v. Burson*, 952 F.2d 1196, 1201 (10th Cir. 1991); *see also United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1017-18 (7th Cir. 1987). Finally, another three courts of appeals — the Fourth, Eighth, and Eleventh Circuits — have allowed the substantive use of post-arrest, pre-*Miranda* silence. *See, e.g., United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985); *United States v. Frazier*, 408 F.3d 1102, 1109-11 (8th Cir. 2005); *United States v. Rivera*, 944 F.2d 1563, 1568 & n.12 (11th Cir. 1991).[2]

The government concedes there is circuit disarray. The government writes: "some courts of appeals have disagreed about whether the government may use a defendant's post-arrest, pre-warnings silence as substantive evidence of guilt." Opp. 6. Indeed, the government agrees with our description of the circuits. Opp. 8 & n.2 (three circuits "have held that the admission of evidence of such silence, as substantive evidence of guilt, violates the Fifth Amendment," "[t]hree other circuits have held that evidence of a defendant's *pre-arrest* silence may not be admitted as substantive evidence of guilt," and three have held that such evidence may be used) (emphasis in original). The

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[2] *See also* Pet. 13-14 (detailing the split between state courts on the question presented).

government properly concludes that "[t]he courts of appeals to have addressed the issue have reached varying conclusions." Opp. 8.

In short, there is no doubt that the question presented warrants this Court's review. The issue has seriously divided the courts of appeals. There is no reason to await further consideration of the issue. And, as this case demonstrates, the issue is of critical importance to the fairness of numerous criminal trials. The government does not dispute that the Court should clarify the state of the law. Instead, the government's sole rationale for avoiding review is that this case is not "an appropriate vehicle for resolving the disagreement in the courts of appeals. . . ." Opp. 9. As we show next, this last-ditch effort to avoid review is also unfounded.

II. THIS CASE IS A PROPER VEHICLE TO CONSIDER THE QUESTION PRESENTED.

1. The government's principal "vehicle" argument is of the "it would have made no difference" school. The government highlights *United States v. Velarde-Gomez*, 269 F.3d 1023 (9th Cir. 2001) (en banc), as an instance of where commenting on post-arrest silence was "not harmless." Opp. 8-9. There, the government "'used the testimony about [defendant's] silence as its principal means of meeting its burden on the critical element of knowledge'" and the remaining evidence was "'not so strong.'" Opp. 9, quoting *Velarde-Gomez*, 269 F.3d at 1035. Here, the government argues by way of contrast, the evidence against petitioner was "'overwhelming'" and "'essentially uncontroverted.'" Opp. 12, quoting *United States v.*

Cotton, 535 U.S. 625, 633 (2002) and citing *United States v. Wiley*, 29 F.3d 345, 349 (8th Cir. 1994). But the government's quotations *from different cases* do nothing to show the strength of the government's case here. So too, the government's catalog of supposedly damaging facts is fully consistent with petitioner's explanation, supported by witnesses, that he was driving his brother-in-law's car and was unaware of the gun hidden elsewhere in the car.[3] At most, the government presented evidence to support an "inference" that petitioner possessed the firearms at issue. Pet. App. 14a.

Put simply, this shaky case against petitioner bears a great deal of resemblance to the case against the defendant in *Velarde-Gomez*. As in *Velarde-Gomez*, the government needed to repeatedly comment on petitioner's silence in order to prove a key element (here, possession of a firearm) in a case built on circumstantial evidence. And, as in *Velarde-Gomez*, the constitutional error of commenting on petitioner's silence was far from harmless. *Cf. United States v. Edwards*, 576 F.3d 1152, 1155 (5th

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[3] For example, the government points to the fact that petitioner was the driver and only occupant of the vehicle and that he told an arresting officer that he was in the process of buying the car. Opp. 12. None of this is inconsistent with petitioner's defense that he was driving his brother-in-law's car, as his brother-in-law testified. Pet. 4-5. The government's statement that one gun was located next to the driver's seat also is fully consistent with petitioner's brother-in-law's testimony that he placed a gun between the driver's seat and the console before petitioner borrowed his car. *Id.* The location of the gun says nothing about whether petitioner knew that it was there. In short, the very facts that the government points to reveal the thinness of the evidence in this case.

Cir. 1978) ("The prosecutor by his comments brought the defendant's silence upon arrest and at trial to the attention of the jury, apparently intending to shore up his less-than-overwhelming evidence by leading the jury to make inferences of guilt from defendant's silence.").

In any event, as the Fifth Circuit itself has acknowledged, errors of this type are so prejudicial that they are almost always grounds for reversal. *See United States v. Impson*, 531 F.2d 274, 278-79 (5th Cir. 1976) (rejecting the government's contention that substantive comment on a defendant's pre-*Miranda* silence was harmless error because "any reference to his silence carried with it an intolerably prejudicial impact"); *see also Edwards*, 576 F.2d at 1155 (reversing conviction and "not[ing] that the comment upon silence of the accused is a crooked knife and one likely to turn in the prosecutor's hand. The circumstances under which it will not occasion a reversal are few and discrete."). Here, where the evidence was so thin, there is no doubt that the constitutional errors pose sufficient risk to have altered the outcome and that reversal is warranted.[4]

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[4] Although the trial judge gave a general instruction to disregard properly objected to questions, the government (Opp. 13) cites no case for the proposition that such a generic instruction can cure such a consistent pattern of unlawful questioning. To the contrary, the Fifth Circuit has properly recognized that limiting instructions are not sufficient to cure error in this context. *See Edwards*, 576 F.2d at 1154 (observing that government comment on a defendant's silence at arrest "may constitute plain error . . . and a judge's cautionary instruction will not suffice to cure the error") (internal citation omitted); *see also Impson*, 531 F.2d at 278 (holding that

2. The government also highlights that the Fifth Circuit's opinion purports to avoid deciding the question presented. The government claims that "the court did not decide whether there was constitutional error." Opp. 9-10. But any fair reading of the decision below establishes precisely the opposite.

Until this case, the Fifth Circuit was squarely aligned with the circuits which deemed it unconstitutional for a prosecutor to use a defendant's post-arrest, pre-*Miranda* silence as substantive evidence of his guilt. Indeed, the Fifth Circuit led the way, when it first held in *Impson* that substantive prosecutorial use of such silence is impermissible. 531 F.2d at 279. In doing so, it was consistent with its prior precedent: "The propriety of government counsel's eliciting testimony that a defendant was silent when arrested, without explaining his actions, has been condemned by this Court in a number of cases . . . ." *Id.* at 278. *Impson*'s holding was grounded in Fifth Amendment principles and the concern that a defendant whose post-arrest silence was commented on by the prosecution at trial would be penalized for exercising his Fifth Amendment rights. *Id.* at 277 ("Doubt should not be cast upon his credibility as a penalty for exercising his prerogative to make no statement to the arresting officer."). The Fifth Circuit again

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references to defendant's pre-*Miranda* silence were not harmless beyond a reasonable doubt even though "the reference to the defendant's silence was brief, isolated, and promptly objected to by the defense. . . . [and] a curative instruction was promptly given by the trial judge").

took this position in *Edwards*. There, it reiterated "the rule that a prosecutor may not comment on a defendant's silence at arrest." *Id.* at 1154 (citing, *inter alia*, *Miranda*, 384 U.S. at 468 n.37 (1966)).

The published decision below completely ignores these clear and binding precedents.[5] The Fifth Circuit did not even mention *Impson* in its decision, even though, as the government here concedes, "the parties fully briefed the issue of the precedential value of *Impson* before the court of appeals." Opp. 11. But the Fifth Circuit cannot avoid review by this Court through the expedience of silent decision-making.[6] The fact that the Fifth Circuit chose to

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[5] *United States v. Musquiz*, 45 F.3d 927 (5th Cir. 1995), which the government relies on, is inapposite. In that case, the defendant testified and was cross-examined on his post-arrest, pre-*Miranda* silence. *Id.* at 930. His silence was *not* introduced as part of the government's case-in-chief. The Fifth Circuit held that this was not error, relying not on this Court's Fifth Amendment jurisprudence but on its due process cases. Thus, *Impson* still controls cases where, as here, evidence of a defendant's pre-*Miranda* silence is part of the government's substantive case. Moreover, to the extent that *Musquiz* indicated in dicta that *Impson* was "fact bound," the facts in this case are virtually identical.

[6] The Fifth Circuit undertook the same silent decision-making on this issue in another recent case, *United States v. Pando Franco*, No. 06-51120, 2007 WL 2875969, at *5 (Oct. 4, 2007). In *Pando Franco*, "[a]t trial, during its case in chief, the Government made several reference to and elicited testimony regarding Pando's post-arrest, pre- and post-*Miranda* silence." *Id.* at *2. Nevertheless, just as in this case, the Fifth Circuit claimed not to decide whether the substantive use of pre-*Miranda* silence violates the Fifth Amendment — again outlining the circuit split but failing to even mention *Impson*. *Id.* at *5 & n.1. This practice simply cannot be condoned and creates further confusion in the law.

ignore controlling precedent in deciding this case does not mean that the court did not decide the question. Effectively, it did so when it chose not only not to follow but to ignore controlling precedent that dictated the opposite outcome.[7]

* * *

The question whether the government's use of a defendant's pre-*Miranda* silence as substantive evidence of guilt violates the Fifth Amendment is squarely presented here and warrants this Court's review. The government agrees that the circuits and state courts are deeply divided on this issue and does not dispute the need for clarification from this Court. There is no need for this Court to wait for a better vehicle. The Fifth Circuit's strained plain error ruling is no barrier to this Court's review. And, as the cases the government discusses show, the question presented repeatedly arises in a plain error context or in cases where the court ultimately decides any error is harmless. Opp. 8 & n.4. There is simply no need to wait to clarify this important question for the lower courts.

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[7] This Court's precedent on whether and when it will consider questions not expressly addressed by the lower court is not as black and white as the government implies. Rather, this Court has stated that "[a]lthough [it does] not ordinarily consider questions not specifically passed upon by the lower court, this rule is not inflexible, particularly in cases coming, as this one does, from the federal courts." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697 (1984) (internal citation omitted) (considering question when it had been raised below and was fully briefed and argued pursuant to this Court's order).

CONCLUSION

For the foregoing reasons and those previously stated, the petition should be granted.

Respectfully submitted,

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